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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-421

RICHARD VEED,

Petitioner,

vs.

EDWARD SCHWARTZKOPF, KERMIT HANSEN, KERMIT WAGNER, ROBERT J. PROKOP, ROBERT L. RAUN, ROBERT KOEFOOT, JOHN G. ELLIOTT, JAMES H. MOYLAN, D. B. VARNER and JAMES H. ZUMBERGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Richard Veed prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Eighth Circuit entered below in the manner hereafter set forth.

OPINIONS BELOW

On July 23, 1973, the United States Court of Appeals for the Eighth Circuit by unreported opinion and decision denied the petition of Richard Veed for rehearing en banc

and denied the petition of Richard Veed for rehearing. (App. A, infra, p. 15). The said Court of Appeals had previously on June 27, 1973 by unreported opinion and decision, and in the absence of oral argument, entered its Order of Affirmance of a judgment of the United States District Court for the District of Nebraska from which petitioner Richard Veed had appealed. (App. B, infra, p. 16). The original unreported Memorandum of Decision (App. C, infra, pp. 17-25) entered January 15, 1973 by the United States District Court for the District of Nebraska sets forth the reasons for the actual unreported Judgment of the Trial Court filed January 15, 1973 appended hereto. (App. D, infra, p. 26).

STATEMENT OF GROUND OF JURISDICTION

The actual judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed by the Supreme Court of the United States was dated and entered on June 27, 1973. (App. A, infra, p. 15). The order of the United States Court of Appeals for the Eighth Circuit denying both a rehearing and a rehearing en banc was dated and entered on July 23, 1973. (App. B, infra, p. 16).

This court has jurisdiction to review the judgment in question by virtue of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

The questions presented for review are as follows:

(1) Is the exercise of a citizen's right to subscribe to or financially support a particular newspaper, or none at all, an expression of the citizen's opinion constitutionally

protected by the freedom of the press and the freedom of speech provisions of the First Amendment of the United States Constitution?

(2) Is the exercise of a citizen's right to join or financially support a particular political association of citizens, or none at all, an expression of the citizen's opinion constitutionally protected by the freedom of speech and freedom of association provisions of the First Amendment of the United States Constitution?

(3) Is the exercise of a citizen's right to financially patronize a particular system of political speakers, or none at all, an expression of the citizen's opinion constitutionally protected by the freedom of speech provisions of the First Amendment of the United States Constitution?

(4) Did the Court below err, contrary to the Constitution of the United States, in sustaining a decision of a United States District Court which did not find a deprivation of constitutional rights per se as a matter of law in a system of financial charges imposed upon a citizen as a condition precedent to his being permitted to attend his own resident state university which denied the citizen the freedom to choose his own newspaper, which denied the citizen the freedom to choose his own political associations, and which denied the citizen the freedom to choose his own political speakers?

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

The First Amendment (Article I) of the United States Constitution states:

Congress shall make no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment (Article XIV) of the United States Constitution, the only section thereof involved herein, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act of 1871, and in particular that section thereof now known as Section 1983 of Title 42 of the United States Code, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Finally, Section 1343 of Title 28, United States Code, provides in pertinent part as follows:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

The petitioner, Richard Veed, is an adult citizen of the United States of America and a resident citizen of the State of Nebraska. Respondents are eight regents and two chief administrators of the University of Nebraska, a state educational institution.

Respondents acting under color of state law in their capacities as University of Nebraska officials, but completely apart from any academic requirements for admission, have been and still are requiring petitioner to surrender his freedom to express his political and religious opinions during that part of his life spent outside the classroom in a manner of his own choosing, as a condition precedent to permitting petitioner to attend his own resident state university, by imposing upon him certain mandatory fees for funding three particular extra-curricular political activities for which no academic credit hours can be earned, namely:

(a) subscription and financial subsidy fees to one particular ordinary newspaper known as the "Daily Nebraskan,"

(b) membership and financial subsidy fees to one particular political association of citizens, a pri-

vate Nebraska corporation known as "Association of Students of the University of Nebraska" (ASUN), and

(c) speaking fees, traveling expenses, speakers bureau commission charges, and other financial subsidy fees to one particular procurement system of political speakers known as the "speaker series" of the "Nebraska Union," a Department of the University of Nebraska.

Taking the view that respondent officials of the University of Nebraska have no constitutional authority to interfere with his political and religious life as a citizen lived outside of the academic classrooms of the University of Nebraska, petitioner commenced suit against respondents in the summer of 1972 in the United States District Court for the District of Nebraska.

The basis for federal jurisdiction in the court of the first instance, petitioner's action being one for equitable relief under the Civil Rights Act of 1871, now known as Section 1983 of Title 42 of the United States Code, is found in Section 1343 of Title 28 of the United States Code which specifically authorizes such action in the United States District Court for the District of Nebraska.

In the United States District Court original trial, with regard to Petitioner's main contentions that as a citizen he was free to express his private political and religious convictions within a newspaper forum of his own choosing or none at all, within a political association of citizens forum of his own choosing or none at all; within a system of political speakers forum of his own choosing or none at all, during that part of his life as a citizen spent outside of the academic classroom; the United States District

Judge held to the contrary that petitioner must submit to the exacting of fees from him by respondents to finance a particular newspaper chosen by respondents, not petitioner, to finance a particular political association of citizens chosen by respondents, not petitioner, and to finance a particular system of political speakers chosen by respondents, not petitioner, as a condition of his enrollment at the University of Nebraska. (App. C, infra, pp. 17-25).

Petitioner appealed this adverse trial court decision to the United States Court of Appeals for the Eighth Circuit which summarily affirmed (App. B, infra, p. 16), without hearing oral arguments, the original judgment of the United States District Court for the District of Nebraska, and also denied petitioner's request for rehearing and his request for a rehearing by the United States Court of Appeals for the Eighth Circuit en banc. (App. A, infra, p. 15).

THE CRUCIAL REASON FOR GRANTING THIS WRIT OF CERTIORARI

The United States Court of Appeals for the Eighth Circuit in affirming a decision of the United States District Court for the District of Nebraska in the instant case has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States in the field of freedom of speech rights of citizens attending a state university.

Petitioner respectfully contends that an exercise of the power of supervision of the Supreme Court of the United States is called for in this case due to a failure of the federal courts below to recognize the full import of the decisions of the United States Supreme Court in the field

of freedom of speech rights of citizens attending a state university, especially *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), and *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923).

Citing a half century of decisions commencing with *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), the Supreme Court of the United States in a recent decision, *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), made it crystal clear that a state educational institution may not revoke or impair the rights of citizens secured by the First Amendment of the United States Constitution, in its opinion found at page 737 of 21 L. Ed. 2d:

> ". . . First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students. It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years . . ."

It is interesting to note at the outset that both the *Meyer* decision and the *Tinker* decision of the United States Supreme Court restrained state educational officials from interfering with constitutional rights of *children* while *inside the classroom*; whereas the facts in the case at bar concern an attempt by state educational officials to interfere with constitutional rights of *adults* while *outside the classroom.*

Thus, the first failing of the courts below in the instant case is the erroneous assumption that a Nebraska university has any authority whatsoever over the political and relig-

ious life of its citizen-students during that part of their lives spent outside the classroom. To understand the depth of this error and the degree to which the instant decision of the United States Court of Appeals for the Eighth Circuit in affirming the trial court stands in clear contradiction to the holdings of the United States Supreme Court in the decisions of *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), and *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); it is necessary to compare the facts in the *Tinker* case with the case at bar and in turn the startlingly different judicial results. The Supreme Court of the United States held in the case of *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), that public school authorities have no constitutional power to force a thirteen year old school girl to remove a black arm band worn in class as a protest against the foreign policy of the United States by virtue of the First Amendment of the United States Constitution. On the other hand, in the case of Petitioner Richard Veed, the United States District Court for the District of Nebraska held (App. C, infra, pp. 17-25), and was summarily sustained by the United States Court of Appeals for the Eighth Circuit (App. B, infra, p. 16), that respondent officials of the University of Nebraska do have the constitutional power to force an adult citizen and resident of Nebraska and a citizen of the United States, during that part of his life spent outside the classroom:

(1) to forfeit his First Amendment rights as to which newspaper, if any, he may wish to subscribe to or financially patronize;

(2) to forfeit his First Amendment rights as to which political associations, if any, he may wish to join or financially patronize; and

(3) to forfeit his First Amendment rights as to which system of political speakers, if any, he may wish to associate himself with or financially patronize,

as the *quid pro quo* for petitioner being permitted to attend his own resident state university, via the imposition of certain mandatory fees exacted from petitioner, as a condition precedent to his matriculation, for the financial patronage of one particular newspaper, one particular political association of citizens, and one particular system of political speakers.

It also appears that the courts below refused to recognize that "educational power" cannot be used to infringe upon the free political and religious choices and decisions of a citizen, as for example in the following five illustrations:

(1) Educational power cannot be used to force a child to take off a black arm band worn in class as a protest against the foreign policy of the United States. *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969);

(2) Educational power cannot be used to enforce conformity of political or religious behavior. *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923);

(3) Educational power cannot be used to force a citizen to salute the American flag. *West Virginia Board of Education v. Barnett*, 319 U. S. 24, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943);

(4) Educational power cannot be used to deny citizens the right to form political associations of their own choosing. *Healy v. James*, —— U. S. ——, 33 L. Ed. 2d 266, 92 S. Ct. —— (1972); and

(5) Educational power cannot be used to prevent citizens from distributing their own publications on campus. *Papish v. University of Missouri*, —— U. S. ——, 35 L. Ed. 2d 618, 93 S. Ct. —— (1973).

Petitioner contends that the choice of a United States citizen as to which newspaper he shall subscribe to or financially support, which political associations he shall join or financially support, which system of political speakers he shall financially support, are all private decisions involving the exercise of his political and religious liberty, and are specific EXPRESSIONS OF HIS OWN FREEDOM OF SPEECH; furthermore that the choice not to subscribe to a particular newspaper or not to financially support a particular association or not to finance a particular system of political speakers are also expressions of his own freedom of speech and cannot be forced upon him by any educational authority, due to the bar of the freedom of the press, freedom of speech, and freedom of religion provisions of the First Amendment of the United States Constitution. Freedom to participate in politics in the United States also includes the right NOT to participate in politics if that is the desire of the citizen.

What respondent officials of the University of Nebraska are doing is to deny admission to the university to any Nebraska and United States citizen who refuses to follow the official party line and who refuses to financially patronize the "official" political newspaper selected by these officials, not the citizen, the "official" political association of citizens selected by these officials, not the citizen, and the "official" procurement system of political speakers: thus repeating a constitutional error made fifty years ago in Nebraska and well documented by the Supreme Court of the United States in the *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) decision and discussed at pages 740-741 of 21 L. Ed. 2d:

". . . In Meyer v. Nebraska, supra, at 402, 67 L. Ed. at

> 1046, 29 A. L. R. 1446, Mr. Justice McReynolds expressed this Nation's repudication of the principle that a State might so conduct its schools as to 'foster a homogeneous people.' He said:
>
> > 'In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardian. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spit of the Constitution.' . . ."

Yet that is the very mistake being made by the unique mandatory fee system being forced upon Petitioner by officials of the University of Nebraska. He is forced to surrender complete freedom of choice of newspapers, or he will not attend the University of Nebraska. He is forced to surrender freedom of choice of political associations, or he will not attend the University of Nebraska. He is forced to surrender freedom of choice of political speaker systems, or he will not attend the University of Nebraska.

It is a sad commentary on our times if we have reached the point mentioned by the United States Supreme Court in the decision of *Tinker v. Des Moines Community School Dist.*, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), at page 741 of 21 L. Ed. 2d, where Freedom of expression can only be exercised:

> ". . . in an area that a benevolent government has provided as a safe haven for crackpots . . ."

Petitioner vociferously contends that neither Congress nor the States nor officials of the University of Nebraska may abridge his right to freedom of the press, to freedom of speech, to freedom of association, and to freedom of religion, and that under these guarantees of the First Amendment of the United States Constitution, he cannot be forced to surrender the free choices in his own private political and religious life lived outside the classroom to officials of the University as the price of his attendance. The choice of political and religious forums in this life is a choice for the citizen to make, not an educational entity. Petitioner has the right to choose his own newspaper forum, or none; his own political association forum, or none; his own system of political speakers forum, or none; and these choices cannot be fettered with restrictions on the free exercise of his free speech and the expressions of his political opinion manifested by the newspapers he buys or rejects and the political associations he makes or rejects. His political and religious life outside of the classroom is not subject to the whims of respondent officials of the University of Nebraska and the good motives of these officials does not erase the unconstitutionality of the mandatory fee system they continue to impose upon the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition of Richard Veed for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for the Petitioner

(Member of the Supreme Court of
the United States)

Of Counsel:
PHILLIPS & MURPHY

CERTIFICATE OF SERVICE

Copies mailed to Counsel for Respondents as per Certificate of Service on file.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 73-1095 September Term, 1972

Richard Veed, Appellant,	)	
vs.	)	Appeal from the United States District Court for the District of Nebraska.
Edward Schwartzkopf, et al., Appellees.	)	

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

July 23, 1973

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 73-1095

RICHARD VEED, Appellant,	)	
v.	)	Appeal from the United States District Court
EDWARD SCHWARTZKOPF, et al., Appellees.	)	for the District of Nebraska

Filed: June 27, 1973

Before HEANEY, BRIGHT, and ROSS, Circuit Judges.

ORDER OF AFFIRMANCE

Upon a careful consideration of the record and the briefs of the parties, the Court has concluded that the judgment of the District Court is based on findings that are not clearly erroneous, that no error of law appears, and that an opinion would have no precedential value. For these reasons the judgment appealed from is hereby affirmed on the basis of the memorandum opinion of the trial judge. See Rule 14 of the Rules of this Court.

Costs taxed in favor of the Appellees:

Costs of printing 25 copies of Appellees' brief:	$113.09
Total costs of Appellees for recovery from Appellant in the U. S. District Court	$113.09

NOT TO BE PUBLISHED

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit.

July 30, 1973

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

RICHARD VEED,	)	
Plaintiff,	)	
vs.	)	
EDWARD SCHWARTZKOPF, KERMIT HANSEN, KERMIT WAGNER, ROBERT J. PROKOP, ROBERT L. RAUN, ROBERT KOEFOOT, JOHN G. ELLIOTT, JAMES MOYLAN, D. B. VARNER and JAMES H. ZUMBERGE,	)	MEMORANDUM OF DECISION
Defendants.	)	CV72-L-214

APPEARANCES: For plaintiff, Lawrence Murphy
For defendants, Alan E. Peterson

WARREN K. URBOM, Chief Judge

The complaint challenges the constitutionality of the imposition of mandatory student fees at a state university for use in subsidizing a student newspaper, a student association, and a speaking program. Following denial of a request for a temporary injunction, the case was tried on the merits and now is in position for decision.

I.

The relevant facts are not seriously in dispute and have largely been set forth in a pretrial stipulation of facts, although by testimony there was supplementation of the stipulated facts. The plaintiff, Richard Veed, is a 20-year-old citizen of Nebraska who presently is enrolled and continuously since the fall of 1970 has been enrolled for the

fall and spring semesters as a full-time student at the University of Nebraska at Lincoln. The defendants are members of the Board of Regents of the University of Nebraska, the president of the University of Nebraska, and the chancellor of the University of Nebraska at Lincoln.

At the time of registration during each of the semesters in which the plaintiff has been in attendance at the University of Nebraska he has been required to pay, as a prerequisite to enrollment, mandatory student fees in the total amount of $51.50 each semester in accordance with a fee schedule adopted by the Board of Regents. Of the $51.50 paid each semester, distribution has been made by directive of the Board of Regents to various organizations and functions of the university, including the support of certain noncredit activities, such as the writing and publishing of the daily student newspaper, the *Daily Nebraskan;* the support of the activities and operations of the Association of Students of the University of Nebraska (ASUN); and payment of fees and expenses of speakers appearing at the university through the auspices of the Nebraska Union. The defendants who are members of the Board of Regents evidently intend to continue in the immediate future such use of student fees.

During the tenure of the plaintiff as a student at the University of Nebraska, he has paid mandatory student fees in the following categories complained of in this litigation:

The Daily Nebraskan newspaper	$ 6.25
Association of Students of the University of Nebraska	1.50
Nebraska Union, facilities and speakers	30.00

Unallocated student fees	9.75
	$47.50

The *Daily Nebraskan* is a newspaper substantially supported by student fee payments collected at the beginning of each semester, although some of its operating revenue comes from the sale of advertising space. The newspaper is one of general circulation on the university campus and is distributed free of charge to all students. Reported are news of general campus interest, sports news, and editorial opinion directed at events of local, national and international significance. The *Daily Nebraskan* is written and published by students under the general supervision of the Publications Board of the University of Nebraska, which is composed of students and faculty members but has no general editorial veto power over the content of the newspaper.

The Association of Students of the University of Nebraska is the student government of the university. It is structured with executive, judicial and legislative branches. The executive is composed of the ASUN president, the first vice president and the second vice president, elected by popular student vote; the student cabinet; the director of records; and the electoral commissioner. The legislative branch is the student senate, composed of 35 representatives elected by students of the various colleges of the university. The judicial branch is the student court consisting of a chief justice and six associate justices, appointed by the retiring president of ASUN at the end of each academic year. A part of the purpose of ASUN is to represent the student viewpoint, as expressed through its elected representatives to the various governing bodies of the university itself.

Appendix

Throughout the academic year, speakers are invited to appear at the university to speak on a wide range of topics. Funds to pay the fees and expenses of these speakers are provided from the mandatory student fees. Initial speaker selection is made by the Talks and Topics Committee of the Program Council of the Nebraska Union Board. Anyone desiring a particular speaker to appear first consults the chairman of the Talks and Topics Committee. Its recommendation then goes to the Program Council, which then submits its recommendation to the Nebraska Union Board, which has the responsibility of final selection. The Nebraska Union Board is composed of seven students, selected by students, and three faculty members, appointed by the chancellor. The Program Council is composed of nine students; the Talks and Topics Committee is composed of a chairman, who is selected by the Program Council, and other members, who are appointed by the chairman of the committee. Special committees have been appointed to handle specialized topics, such as the World in Revolution Conference of 1971.

The unallocated fee fund is for further extracurricular student activities, whether or not as a matter of individual conscience, expression of political belief, exercise of personal religion, or expression of personal liberty the students desire to subscribe to, associate with, or financially support any of such activities.

No credit hours are granted by the University of Nebraska to any student simply because the student writes articles or editorials for the *Daily Nebraskan*, or simply because the student participates in the activities of ASUN, or simply because the student attends the conferences and speaking engagements sponsored by ASUN or the Nebraska

Union, or any other activity funded by manatory student fees. Many voluntary organizations of students at the university are not funded with mandatory student fees, including the UNL Young Republication organization, the UNL Young Democratic organization, and the UNL Student Bar Association.

The defendants have permitted ASUN to use mandatory student fees for paying private attorney fees for ASUN, for paying travel expenses of certain students to conferences of the National Student Association, and for paying salaries of employees of ASUN.

Mandatory student fees were used to pay the expenses of the 1971 Time-Out Conference on Human Sexuality via the use of fees previously allocated to ASUN and the Nebraska Union, which consisted in part of speakers who held themselves out to the public as homosexual persons and who spoke on the state of homosexuality. In 1971 mandatory student fees were used to purchase a birth control book. On November 2, 1972, five days prior to the November 7, 1972, election involving the candidacy of Carl T. Curtis for the office of United States Senator, columnist Jack Anderson spoke on the Lincoln campus of the University of Nebraska as a part of a public speaking program of the Nebraska Union, funded with mandatory student fees.

The plaintiff sharply disagrees with the philosophies expressed by many of the speakers who have been invited to speak at the university and is in substantial disagreement with the editorial philosophies generally adopted by the *Daily Nebraskan.* His concern, however, is not that the *Daily Nebraskan* is published or that the speakers ap-

pear, but that fees imposed upon him are used for those purposes without, he claims, a choice on his part. In fact, he quite regularly has read the *Daily Nebraskan* and has attended some of the conferences and speaking appearances, all voluntarily and without compulsion. Neither the university as an entity nor any of the defendants exercises any significant control over the selection process of speakers. Neither the university as an entity nor any of the defendants seeks to make selections of editors of the *Daily Nebraskan* or of speakers on the basis of political or personal philosophy. There is nothing to show that the university, as collector and assessor of mandatory student fees, or any of the defendants has used those fees in an attempt to support or advance any particular political or personal philosophy.

II.

Although the parties in the final pretrial order have listed a number of issues which they separately contend to be controverted issues of fact and law, I am persuaded that the essential issue may be simply stated as follows: Is a state university constitutionally prohibited from providing a forum for the expression of political and personal opinions with financial support of mandatorily assessed student fees? In my judgment the answer must be in the negative.

The plaintiff argues that requiring him to expend monies for the support of a student newspaper and to pay fees of speakers who appear on the university campus to express political or religious philosophies repugnant to his own is to force him to become associated with such philosophies in violation of his right to freedom of speech, free-

dom of religion, freedom of the press, and freedom of association.

The difficulty with the plaintiff's position is that it assumes a fact which finds no support in the evidence: that in its program of supporting extracurricular speakers and a student newspaper the university assumes the role of advocate for the particular philosophy expressed by the speakers and the newspaper. The evidence is to the contrary. There is no direction as to how the fees must be spent nor is there any form of editorial censorship exercised over the newspaper. Indeed, such control by the university would raise grave constitutional questions. See *Brooks v. Auburn University,* 412 F. 2d 1171 (C. A. 5th Cir. 1969); *Trujillo v. Love,* 322 F. Supp. 1266 (U. S. D. C. Colo. 1971).

Within wide limitations a state is free to adopt such educational philosophy as it chooses. The Board of Regents of the University of Nebraska obviously has embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom under the tutelage of instructors and professors. The practices of the Board of Regents indicate that it considers as relevant to the educational process extracurricular opportunities for students to be exposed to speakers outside the classroom who may express widely divergent opinions on a number of topics. It clearly has concluded to adopt as a part of the educational process the publication and distribution of a student newspaper. Whether such activities in fact are educational in nature is for the Board of Regents to determine, subject only to the limitations that the determination be not arbitrary or capricious and that it not have the effect of imposing upon the student the

acceptance or practice of religious, political or personal views repugnant to him or chilling his exercise of his constitutional rights. As a matter of law and of fact, there has been none of those limitations violated by the university or its officials in this case.

The plaintiff has remained free to associate himself with those political, religious and personal philosophies which most closely conform to his own. No prior restraint has been imposed upon him in the exercise of his constitutional rights, nor have any sanctions been visited upon him because he has chosen to exercise his rights. The First Amendment guarantees that students shall be free to express themselves, as long as the expression does not interfere with the orderly conduct of the process of education. *Tinker v. Des Moines School District*, 393 U. S. 503 (1969). Similarly, the First Amendment protects the student from official compulsion to adopt or verbalize any particular political or personal philosophy. *Board of Education v. Barnette*, 319 U. S. 624 (1943). But a university is not constitutionally prohibited from financing through mandatory student fees programs which provide a forum for expression of opinion, be that expression oral or written.

Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts. Arguments on that point must be directed to a more appropriate forum.

This memorandum of decision shall constitute findings

of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Judgment will be entered for the defendants.

Dated January 12, 1973.

BY THE COURT

Warren K. Urbom

Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

RICHARD VEED, Plaintiff,	)	JUDGMENT
vs.	)	
EDWARD SCHWARTZKOPF, et al, Defendants.	)	CV72-L-214

For the reasons stated in the memorandum of decision of today,

IT HEREBY IS ORDERED AND ADJUDGED that judgment be and hereby is entered for the defendants.

Dated January 12, 1973.

BY THE COURT

Warren K. Urbom

Chief Judge

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In The

Supreme Court of the United States

October Term, 1972

No. 73-421

RICHARD VEED,

Petitioner,

vs.

EDWARD SCHWARTZKOPF, KERMIT HANSEN, KERMIT WAGNER, ROBERT J. PROKOP, ROBERT L. RAUN, ROBERT KOEFOOT, JOHN G. ELLIOTT, JAMES H. MOYLAN, D. B. VARNER and JAMES H. ZUMBERGE,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I. Is a state university constitutionally prohibited from providing a forum for the expression of political and personal opinions with financial support of mandatorily assessed student fees?

STATEMENT OF THE CASE

The petitioner, Richard Veed, brought this action challenging the mandatory student fees collection and expenditure at the University of Nebraska, claiming that such system violated his freedom of speech, freedom of association, freedom of religion, freedom of the

press, Fourteenth Amendment due process, Fourteenth Amendment equal protection, Fourteenth Amendment privileges and immunities clause and other "unenumerated private, political, religious and other citizenship rights of plaintiff" under the Ninth and Tenth Amendments of the Constitution of the United States. The action was brought as a civil rights action under 42 U.S.C. § 1983, claiming that the particular defendants, respondents here, who are members of the governing Board of Regents of the University of Nebraska and chief administrators of the University under color of state law violated the above mentioned constitutional rights of Mr. Veed.

Trial was held before the Honorable Warren K. Urbom, Chief Judge of the United States District Court for the District of Nebraska, in Lincoln, Nebraska, in December, 1972. The court held that the Regents and administrators were not constitutionally prohibited from apportioning mandatorily collected student fees for the support of forums for expression of personal or political views. Therefore, Richard Veed's prayer for injunction against the student fee system was denied. The United States Court of Appeals for the Eighth Circuit affirmed, adopting as its rationale, the memorandum opinion of the trial court. Petitioner now appears to have limited his claim and theories to one single proposition. Petitioner now claims that the expenditures of student fees on forums disliked by petitioner, violates the First Amendment free speech clause of the United States Constitution.

SUPPLEMENTAL FACTUAL BACKGROUND

The testimony of some of the witnesses would appear relevant to the question and theory of First Amendment violation, and a brief summary is therefore provided.

Of the three challenged uses of student fee moneys (campus paper, student government and outside speaker

program), the first and the one which seems to have received most attention was the campus newspaper, "The Daily Nebraskan." "The Daily Nebraskan" operates under guidelines prepared by a committee of professional journalists, students and faculty. These guidelines are not an outline for censorship (R. 26-28). All students on the University campus are eligible to apply for positions on the campus newspaper (R. 39). "The Daily Nebraskan" has the functions, according to its present editor-in-chief, James Gray, as (1) a news and opinion forum for the students and (2) to provide an educational experience for its staff (R. 40). Students may write letters to the editor (R. 44-45), and in fact the plaintiff Richard Veed himself has written letters to the editor, one of which was published on the subject of co-ed visitation rights in the student dormitories (R. 90-91). The plaintiff Veed is a regular reader of "The Daily Nebraskan" newspaper (R. 85, 98, 99-100), and admits that he may have learned something from his use of the newspaper. A "publication board" is available for students who have complaints about the policies or particular items in "The Daily Nebraskan" newspaper (R. 146).

With respect to the campus government organization, the Association of Students at the University of Nebraska, Mr. Veed indicated that his only real objection at the time of the trial was that he had no choice whether or not to be a member of that association (R. 86). However, he also testified that at one point in his school career he ran for office in the ASUN and that at another point he considered running for the ASUN Student Tribunal (R. 94-95). Finally, the testimony of Dr. Peter Wirtz, Assistant Dean for Student Development and Coordinator of Student Activities at the University of Nebraska, Lincoln, described four separate ways in which any student at the University

is able to participate in every decision made by the ASUN—he can attend the open public discussion at the Student Senate weekly meeting; he can contact and ask for legislation from the representative of his college at the University; he can participate simply by volunteering to be on any committee of the ASUN; and he can run for office either in the executive, judicial, or legislative branch of the ASUN (R. 142-145).

With respect to the speaker programs objected to by plaintiff Veed, Mr. Veed admitted that he had never helped in the selection of speakers, even though he knew full well how to participate in that task (R. 92-94). Allen Bennett, Director of the Nebraska Union, the student union at the University of Nebraska-Lincoln, set forth in detail the means by which any student at the University who is currently enrolled and carrying a minimum of credit hours can participate in a number of ways in the selection of speakers (R. 127-133).

Finally, one of the respondents, Robert J. Prokop, a regent, testified that the whole issue and area of student fees is under general and extensive study and discussion on the University campuses, both by the Regents as well as by various study groups and committees, as an ongoing part of the administration of the schools (R. 19-24). This point is noted because the area of student fees seems well within the governing responsibilities and duties of the governors and administrators of the University, and generally not a matter for federal court intervention, in the absence of a showing of abuse in a "constitutional" degree and kind.

ARGUMENT AGAINST GRANTING OF CERTIORARI

The Mandatory Student Fees Collection and Apportionment System at The University of Nebraska in No Way Violates the Free Speech Right of Students.

The petitioner Richard Veed bases his petition, ap-

parently, on the First Amendment, claiming that in some manner his freedom to choose his own political and religious life and expression and his freedom of association have been violated. The whole basis for this argument is the theory that paying student fees constitutes enforced support for unwanted ideas, thus violating the freedom "not to express," citing *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 89 Sup. Ct. 733, 21 L. Ed. 2d 731 (1969). The simple response to this argument is that respondents have the obligation and duty under the laws of Nebraska to collect fees and spend them on university education, and that is all that respondents have done here. They have not forced support of any ideas on petitioner. Nebraska Constitution, Article VII, Section 10, provides that:

> The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided.

Nebraska revised statute section 85-503 (reissue 1966) provides as follows:

> State educational institutions; tuition. All state institutions are empowered to fix tuition and other fees to be paid by students residing in Nebraska.

Finally, the state statutes also set forth the purposes of the University of Nebraska:

> University of Nebraska; object. The object of such institution shall be to afford to the inhabitants of this state the means of acquiring a thorough knowledge of the various branches of literature, science, and arts. Neb. Rev. Stat. Section 85-102 (Reissue 1966).

The opportunities for each student to participate in

the marketplace of ideas are highly developed on the University of Nebraska-Lincoln, campus, and even Richard Veed has grudgingly participated by reading the campus newspaper, writing letters to the editor, running for office in the student government and listening, albeit with some claimed disgust, to outside speakers brought on to campus. While all of these opportunities are provided for participation and exposure to the ideas of other persons, in no way has petitioner Veed been forced to accept, or even to expose his mind to any of these ideas. Nothing in the record will support any other conclusion.

Petitioner's unusual interpretation of *Tinker, supra,* moves him to claim that the mere payment of a fee to a school, part of which is ultimately spent on vehicles for free expression, amounts to a deprivation of petitioner's "right" to remain totally silent. This tack assumes that the only area where educators may expend fee money without the express approval of each of the fee-paying students, is inside the doors of the classrooms. If the *Tinker* case is fairly read, the reader can easily determine that this Court did not there subscribe to so limited a view of education, even in a secondary school. The Court stated explicitly to the contrary:

> The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection.
>
> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities

> is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. 393 U.S. at 512, 21 L. Ed. 2d at 741.

The District Court's opinion in this case found that the challenged activities (outside speakers, student newspaper and student organizations) were determined by the respondents to be a portion of the educational process at the University of Nebraska. Petitioner's appendix, pages 23, 24. Nothing in the *Tinker* decision nor in the case of *Meyer v. Nebraska,* 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923), expressly or implicitly forbids school educators and governing boards from keeping open avenues for free expression on a campus, including the use of student fees to support them.

Numerous cases have upheld student fee uses not popular with every student, against vague constitutional attacks such as that of Mr. Veed. Most recently, in the case of *Chaney v. Ahlgren,* 346 F. Supp. 869 (E.D. Tenn. 1972), the court held that a complaint alleging that conditioning enrollment at the university on payment of "university programs and activities fee" which was used to support, among other things, the student newspaper, the speakers program and the student government association, opposed by the plaintiff, did not state facts constituting a violation of either the due process

or equal protection clauses of the Fourteenth Amendment. The court stated:

> The heart of the plaintiffs' contention appears to be that, since the defendants apply the fees thus collected to purposes which the plaintiffs consider non-educational and to purposes which are undesired by or unpopular with the plaintiffs and a majority of other students within the University, the fee must in some manner violate the plaintiff's constitutional right to due process and equal protection of the laws. While the popularity or unpopularity of an issue may properly address itself to the legislative processes of government, in this case the Board of Trustees, as previously indicated, such matters do not properly address themselves to constitutional issues or to the judicial interpretation thereof. It is apparent that the application by the defendants of the funds derived from the student activities fee is not so unrelated to the operation of the University as to be irrational to the extent of constituting a violation of due process. Provision for student activities, such as student government, student publications, student athletics, student forums, and student entertainment, the matters herein complained of, are not, because of their extracurricular nature or otherwise, so unrelated to the operation of a university as to be irrational and therefore a violation of due process. In the field of public appropriations ". . . the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest." Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 at 514, 57 S. Ct. 868, at 874, 81 L. Ed. 1245 (1937). As is true in the field of public appropriations generally, the same due process rule would be applicable to the more limited field of appropriations for the operation of a university. Due process grants no general authority to the judiciary to substitute its judgment in matters of university appropriations for the judgment of the governing board of the institution.

> It is likewise apparent that the application by the defendants of the funds derived from the student activities fee, while alleged to be unpopular with many if not a majority of the students, is not such a discriminatory application as to render the collection of the fee a violation of any student's right to equal protection of the laws. No allegation is made that the University denies unto any student the right to participate upon an equality with other students in any activity toward which student activity fees are applied. That such activities may be unpopular or even offensive unto students and that students may as a matter of choice elect not to participate therein does not render the activity, nor the appropriation therefor, nor the collection of a fee therefore, a denial of equal protection of the laws. Just as a citizen's election not to use a public school, a public park, a public road, or a public library does not render taxation for such purposes a denial of equal protection of the laws, so a student's election not to participate in an activity financed by student activities fees does not render the assessment of such a fee a denial of equal protection of the laws. *Id.* at 871-72.

Furthermore, the Nebraska Supreme Court has already affirmed summary judgment for essentially the same respondents in a suit brought by the same attorney on behalf of different plaintiff students, alleging essentially the same theories as are presented by petitioner here, as well as state law questions. That case is *Larson v. Board of Regents,* 189 Neb. 688, 204 N. W. 2d 568 (1973). It may be noted that the Nebraska court did direct itself to the federal constitutional objections in great part, and the case would appear to be some authority here, although it was not relied on by the trial court since the state court opinion was issued after this instant case was decided.

Finally, if it be assumed that the respondents Regents and administrators do have some federal constitutional

limitations on their use of student fees, those would only seem to come into play if their use of the fees were far outside the scope of their state educational authority. The following cases demonstrate the breadth of authority of state institutions in using student fees. The language of the Supreme Court of Iowa in *Iowa Hotel Association v. The State Board of Regents*, 114 N. W. 2d 539 (1962), may be pertinent. In that case, the hotel association had challenged the constitutionality of the University collecting student fees and using them to finance the student union facilities. The court held that the expenditure was definitely within the scope of power of the Regents, noting that the purpose of the union was to bring in outside seminars, speakers, and institutes as additional input to the educational process at the University. The court stated:

> The record supports the conclusion of Dr. Hancher, President of the university, that student unions which include facilities such as proposed are "properly a part of an educational institution such as the University of Iowa".
>
> A modern university is not just a number of classrooms where students may learn all they need to know from professors. It must be an inspiration to greater knowledge. It must, through research, explore the unknown. It must learn what others are doing. It must contribute to the general welfare. It must disseminate knowledge beyond the student body through the Extension Division and the Department of Continuing Education. For these purposes it must invite individuals and groups to the campus. Food, housing and entertainment are necessary incidents.

Numerous other cases have sustained the collection of fees notwithstanding the fact that certain students or other individuals disagreed with the use to which the fee money was to be put. For example, a recent case

held that an injunction would not be granted to the plaintiff students against collection and expenditure of their student fees to finance a new football stadium at the Colorado State University. The court concluded, that it would be impossible to require, before an activity fee could be justified, that every student agree with each expenditure or receive an equal benefit from each program or facility contemplated. The plaintiff students' contention that intercollegiate athletics served no educational purpose was also rejected by the court, on the ground that it was the responsibility of the college governing board to decide whether or not intercollegiate athletics contributed to the students' physical, social and mental development and whether such athletics were necessary to promote the objects of the institution, and the court would not disturb the decision made so long as it was within the wide discretionary powers of the Board to decide. *Randall v. Colorado State Board of Agriculture*, Civil Action 19032 (District Court, County of Larimer, Colorado, December 23, 1969) reported in College Law Bulletin, Volume II, Number 5, January, 1970, page 36.

Again, there are numerous cases sustaining the use of mandatory fees for the financing of student activities such as student unions, *Rheam v. Board of Regents*, 161 Okla. 268, 18 P. 2d 535 (1933), and *State v. State Board of Education*, 97 Mont. 121, 33 P. 2d 516 (1934); or for facilities and buildings deemed necessary by the governing college board for the comfort, convenience and welfare of the student body as a whole, *Application of the Board of Regents of the University of Oklahoma*, 195 P. 2d 936 (1948); for parking facilities, *Linnell v. State Department of Finance*, 21 Cal. Rptr. 785 (1962).

In other words, respondents submit that the petitioner has failed to show any proof that the activities they

wish to *silence* are even non-educational, let alone unconstitutional in any way. In this regard, the case of *Bailey v. University of Minnesota*, 187 N. W. 2d 702 (1971) appears to be precedent for rejecting petitioner's request to have the court countermand the decisions made by the Regents of the University of Nebraska. In that case, the plaintiff was dissatisfied with various student activities and demonstrations on the campus, and asked the court to take over control and countermand the judgment of the Board of Regents of the University. The trial court dismissed the case on the pleadings on the ground that the discretion of the governing body of the University was not to be easily tampered with in the courts, and that there was no ground to justify intervention of the court. Affirming, the Supreme Court of Minnesota stated the case as follows:

> From the foregoing cases it is quite clear that the courts must be reluctant to invade the sphere of authority reserved to the regents by our constitution. A case may arise where they have exceeded their authority, but any court action must be limited to a remedy of that particular abuse. One can scarcely conceive of a case in which the courts could be asked more squarely to deprive the regents of their governing powers than in the case at bar, in which plaintiffs have asked the court to assume continuing jurisdiction over the "authorized uses of the property, facilities and endowments of the University" and to issue orders related thereto "from time to time as may be appropriate." *Id.* at 703-704.

CONCLUSION

Petitioner's entire theory depends on inverting both the principles and holding of the *Tinker* decision. Further, his argument requires an archaic view of education as consisting only in the spoon-feeding of material

by teachers to students by lectures and testing, chalk and blackboard, and exclusively within the confines of a "classroom." Necessarily, and legitimately, the learning process at a modern state university such as that administered and governed by the respondents requires a broader concept of education and *at least* a campus-wide "classroom." Petitioner has never been forced to give up one of his views; on the contrary he has been provided with places to stand and speak his views and be heard. Such a use of student fees does not violate the First Amendment. It helps preserve that "first" law of this country. The petition should be denied.

Respectfully submitted,

EDWARD SCHWARTZKOPF, KERMIT HANSEN, KERMIT WAGNER, ROBERT J. PROKOP, ROBERT L. RAUN, ROBERT KOEFOOT, JOHN G. ELLIOTT, JAMES H. MOYLAN, D.B. VARNER and JAMES H. ZUMBERGE,
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